Supreme Court, U.S.
FILED

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No.

OFFICE OF THE CLERK

In the Supreme Court of the United States

JOHN S. GRIMES, JR.,
Petitioner,

v.

THE CITY OF ST. JOSEPH, MISSOURI;
STERETT W. SCHANZE;
HAROLD JOHNSON;
TOM ROBILLARD; ALANE STUDLEY;
and WALTER HUGHES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

The questions presented in this Petition For A Writ Of Certiorari are as follows:

1. Does the Fourth Amendment protection against unreasonable seizure provide the constitutional foundation for a claim of **malicious prosecution under 42 U.S.C. §1983**, and if so, what are the elements of such a claim and what constitutes a seizure?

2. Is **due process** violated when the City Manager who serves in the capacity of having final review or decision making authority over termination of a public employee, is involved in making the initial termination and other disciplinary decisions, is involved in making decisions to initiate and maintain criminal prosecutions and a search, and is required by law to advise the City Council on approval of an arbitration decision which could follow the City Manager's decision?

3. When an **illegal search** is conducted to support criminal charges which can arise only because of the condition resulting from the existence of personal property on real property, can the search be challenged by the person who owns or controls the personal property located on the real property which the person also owns, controls or possesses?

4. Should a court consider evidence of very close temporal proximity between the exercise of a constitutionally protected right (in this case the **right to confront witnesses** in a trial) in relation to the taking of an adverse employment action, and is such evidence sufficient evidence of causation to preclude summary judgment?

PARTIES TO THE PROCEEDING

The petitioner in this case is John S. Grimes, Jr. (hereafter "Grimes"). He was the plaintiff in the District Court proceeding and the appellant in the Court of Appeals proceeding.

The other parties to the proceedings in the District Court (defendants) and Court of Appeals (respondents) were:

The City of St. Joseph, Missouri (hereafter "City")
Sterett (Stett) W. Schanze, Manager for the City of St. Joseph (hereafter "Schanze")
Harold Johnson, Human Resources Director for the City of St. Joseph (hereafter "Johnson")
Tom Robillard, Interim Director for the Community Services Department for the City of St. Joseph (hereafter "Robillard")
Alane Studley, Neighborhood Services Manager for the City of St. Joseph (hereafter "Studley")
Walter Hughes, Senior Code Enforcement Inspector for the City of St. Joseph (hereafter "Hughes")

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PETITION FOR A WRIT OF CERTIORARI

John S. Grimes, Jr. ("Grimes") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case.

OPINIONS BELOW

The order of the District Court (per Fenner, D.J.) granting the respondents' motion for summary judgment (Petition Appendix (hereafter "Pet. App.") A-5) is not published. The opinion of the Court of Appeals (per Bowman, Fagg and Vietor, D.J. sitting by designation) sustaining the district court's judgment (Pet. App. A-1) is not published. The order of the Court of Appeals denying rehearing en banc (Pet. App. A-4) is not published.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was entered on April 18, 2001. Rehearing en banc was denied on May 29, 2001. Jurisdiction in this Court lies under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution provides in pertinent part in the **Fourteenth Amendment, Section 1.**:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

The United States Constitution provides in pertinent part in the **Fourth Amendment**:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .

The United States Constitution provides in pertinent part in the **Sixth Amendment**:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . .

42 U.S.C. §1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Grimes was employed by the City of St. Joseph, Missouri as a nuisance and zoning code enforcement inspector and owned or was in possession or control of several parcels of real estate within the limits of the City. Respondents City, Schanze, Johnson, Robillard and Studley

took various disciplinary actions against Grimes, culminating in the termination of his employment, claiming that the condition of property owned or controlled by him violated the City's nuisance and zoning codes. Concurrently, the same respondents, together with Hughes, considered Grimes criminally guilty and initiated a search warrant procedure and initiated and maintained multiple municipal ordinance prosecutions against him.

Grimes maintained that the ordinances relied upon for the actions against him were vague and overbroad and thus unconstitutional; as a result the ordinances could not form the basis for any employment action or probable cause to support any search or prosecution. All of the prosecutions were resolved in Grimes' favor. Although the City amended the ordinances to correct the constitutional deficiencies in light of Grimes' claims, the respondents persisted in their reliance on the unconstitutional versions of the ordinances for their employment and criminal actions against Grimes.

A run through the gauntlet of arbitrary government action began for Grimes on Saturday, March 14, 1998 when a newspaper story ran suggesting that Grimes was in violation of the City's nuisance and zoning codes with respect to his property at 1906 Bellevue. The Monday after publication of that story an anonymous citizen complaint was supposedly made to the City about the condition of that property. After receipt of the alleged complaint Studley and Hughes inspected that property as well as other property owned, possessed or controlled by Grimes.

It is worth noting that in January and February 1998 Studley and Hughes, without any citizen complaint, had entered on Grimes' properties at 1906 Bellevue, 1903-05 Elwood and 1902-06 Elwood. A house was located at 1906 Bellevue and the front of the property was visible from a public street. The rear of 1906 Bellevue and the vacant lots

at 1903-05 Elwood were accessible and visible only by entry on neighboring private property or via an unimproved alley. The vacant lots at 1902-06 Elwood were accessible only by entry on 1903-05 Elwood. After investigating an anonymous complaint supposedly made concerning Grimes' residence at 1812 Elwood (which was not substantiated), Studley and Hughes decided to inspect all of these properties. Studley and Hughes did not have Grimes' permission to enter the properties and in spite of seeing that the property at 1903-05 Elwood was posted "no trespassing" they entered anyway. No disciplinary or other action was taken by the respondents against Grimes following the illegal entries in January and February.

After the March 1998 news story and inspection Studley gave Grimes a written reprimand related to his employment. At that time Hughes gave Grimes a code enforcement notice to clean up the property at 1906 Bellevue. Grimes was never given a code enforcement notice to clean up any other property owned, possessed or controlled by him.

In April 1998 Grimes was reassigned from his duties as a code enforcement inspector. As permitted by the Personnel Code of the City, enacted as an ordinance, Grimes filed grievances with Robillard in March 1998 concerning the reprimand and in April 1998 concerning the reassignment. After the passage of several weeks, Robillard responded to Grimes' grievances by giving Grimes a memo discussing the issues raised.

In April 1998 after Grimes had filed his grievances with Robillard, Hughes applied to the Municipal Court for the City for a warrant to search some of the property under Grimes' control. On April 1, 1998 after issuance of a search warrant, Robillard, Studley and Hughes searched the property identified in the search warrant (1903-05 Elwood) and by their admission, they searched property which was not

covered by the search warrant (1902-06 Elwood). Robillard, Studley and Hughes testified that they did not realize there were multiple properties and so their unlawful entry was made in good faith. Their own handwriting on documents and photographs noting the multiple property addresses prior to or concurrent with their search, demonstrated that their testimony was not truthful and that they did not act in good faith. In violation of the City ordinances, they did not serve the warrant on any person or post it on the property prior to execution.

The respondents relied on the information gained through the April 1998 search to make decisions about Grimes' employment status and the prosecution of him.

After searching the property Hughes personally served Grimes with a summons and citation to appear in Municipal Court to answer to five charges of violations of the City's nuisance code and of the City's zoning code. The charges against Grimes as stated in the summons and citations were as follows:

> 1906 Bellevue: "Sec. 15-27 Causing or allowing nuisance - plastic buckets, barrels, boards, awning, concrete blocks, tub"
>
> 1902-06 Elwood: "Sec. 15-27 Causing or allowing nuisance Sec. 31-050(g)(1) Storage of material in a residential district Pallets, Concrete Blocks, Buckets, Rock Pile, Metal Pipe"
>
> 1903-05 Elwood: "Sec. 15-27 Causing or allowing nuisance Sec. 31-050(g)(1) Storage of material in a residential district, Concrete Blocks, Rock Pile, Boards, Metal Debris"

A review of the plain language of the citations and of the ordinances cited, reveals that no facts were described

which constituted a violation of the ordinances and, as a result there was no probable cause for the initiation or maintenance of the prosecutions or for the issuance of a search warrant. The language of the ordinances related to the charges was as follows:

> **Sec. 15-27(a).** No person, owner or occupant in control or in possession of any premises within the city limits shall cause or allow any nuisance to exist as defined by the laws of this state or by this Code.
>
> **Section 31-050.(g)(1).** None of the following shall be permitted as an accessory use: (1) equipment, material or vehicles, other than a registered motor vehicle in operable condition, boat, travel trailer, recreational vehicle or pick-up camper as permitted above [none of which were applicable to Grimes' case], for more than 24 hours in a 30 day period in a residential district.

Section 15-26 of the City's ordinances was considered to be "this Code" referred to in Section 15-27(a). Section 15-26 provided as follows:

> **Sec. 15-26.** Any article . . . or any condition allowed to exist . . . which is offensive to the senses or interferes with the free use of property or the maintenance of public health, safety and welfare is declared to be a nuisance. This shall include but not be limited to the following: (1) Noxious or offensive odors. . . . (2) Rubbish, pools of water. . . (3) Abandoned vehicles. . . . (4) Articles or conditions fostering disease or breeding of insects. . . . (5) Detriment to health. . . . (6) Unsanitary buildings . . . . (7) Buildings constructed or maintained in an

> unsanitary condition. . . . (8) Business, trade or profession detrimental to health. . . . (9) Weeds and rank growths of vegetation. . . . (10) Excessive exterior lighting. . . . (11) Miscellaneous. Violations of this article or of Section 20-193.

Clearly on the face of the ordinances as the respondents sought to apply them to Grimes, they were vague for failing to provide a clear standard by which to measure a person's conduct and as a result were unconstitutional.

On April 30, 1998 Grimes appeared at his arraignment on the charges in Municipal Court. Prior to the arraignment, Schanze, Johnson, Robillard and Studley had met and had collectively determined, at the direction of Schanze, that they would wait until after Grimes' arraignment to decide whether to return him to code enforcement duties. The substance of this meeting was documented by Johnson in a written note which is at Pet. App. A-29. In discovery Robillard and Studley testified that they never attended any meeting with Schanze at which Grimes' employment and the search and prosecution were discussed together. Johnson's note proves this testimony to be untruthful.

At the arraignment Grimes rejected a plea offer extended by the City's prosecutor and requested a trial on all charges. On the third business day after requesting a trial (May 4, 1998) Robillard suspended Grimes from his job without pay rather than return him to code enforcement duties. Grimes' request for a trial was the only thing which occurred with respect to this situation, between his arraignment and his suspension. In fact from April 1, 1998 when the search warrant was executed until May 4, 1998 the respondents had not conducted any investigation or received any new information concerning the conditions of the properties. Robillard was fully aware that Grimes had

requested a trial when Robillard suspended Grimes' employment and Robillard knew that Grimes had a right to confront witnesses against him. Robillard carried out the respondents' plan to take employment action against Grimes following the arraignment.

In May 1998 while Grimes was on suspension and awaiting trial, Robillard notified Grimes that his employment was terminated. In giving this notice of termination the respondents for the first time, raised two prior instances of discipline involving Grimes, incorrectly stating that both instances involved Grimes' property maintenance. Grimes had not been notified that in defending the actions against him he should also be addressing events which occurred about four years earlier which he understood had been resolved to the satisfaction of the respondents.

Grimes was not given any opportunity to be heard prior to the suspension of his employment. He made a timely request for review of the suspension decision but the respondents took the position that the conference held after the suspension and before the termination was a pre-termination hearing and was not a review of the suspension. They had discussed terminating Grimes' employment before he was suspended so in essence his suspension without a prior hearing was an opportunity for the respondents to create an appearance of providing due process when they had no intention of taking any action short of termination. After Grimes asserted that the conference should have been to address the suspension rather than to increase the level of discipline to termination, the City enacted a revised ordinance to provide that a suspension without pay would not be considered disciplinary action and thus would not require a pre-suspension hearing.

After his employment was terminated, Grimes made a timely request for review of the termination decision by the

Personnel Board of the City. Upon review, two members of the board voted to return Grimes to his employment and two members voted to uphold the termination. Under the Personnel Code, the board was advisory only to the City Manager, Schanze, who would make the final decision regarding an employee's status. In July 1998 Schanze decided to uphold the termination of Grimes' employment. After the Personnel Board review, Johnson, as secretary of the board, presented a proposed decision for Schanze. In doing so Johnson departed from his standard procedure in that he presented Schanze with only a letter upholding the termination when he normally would have presented one letter upholding the termination and one letter overturning the termination. Schanze had supported the decisions to suspend and terminate Grimes' employment at the time those decisions were being made and that involvement apparently provided Johnson what he needed to know to depart from his usual procedure for letter preparation. To finally decide that Grimes should be reinstated to his employment would have required Schanze to admit that the decisions he made with Johnson, Robillard and Studley were wrong.

In July 1998 two of the five charges were dismissed in Municipal Court because they were based on evidence obtained in the illegal search in April 1998 of property which was not authorized by the search warrant. In July 1998 trial was held before the judge of the City's Municipal Court on the remaining three charges. Four days before the Municipal Court trial was held, Schanze made his decision to uphold the termination of Grimes' employment with the City.

In August 1998 the City's Municipal Court judge entered findings of guilty and Grimes requested a trial *de novo* in Circuit Court.

Trial to a jury on the charges in Circuit Court was scheduled for December 1998. At least by November 1998

the City began revising the nuisance and zoning code provisions to address the constitutional issues which Grimes had raised throughout the proceedings against him. On the day of the jury trial, the City dismissed the charge against Grimes concerning 1906 Bellevue (the property identified in the March 1998 news story which prompted these events) and amended the remaining two charges. In spite of the City's work to amend the nuisance and zoning codes to address their unconstitutionality, the City proceeded with the charges against Grimes under the unconstitutional versions of the ordinances. The jury found Grimes not guilty of the nuisance allegation against him. At the jury trial Hughes testified that he had not even looked for evidence to support a key element of the nuisance charge. The jury found Grimes guilty of the zoning charge and assessed the minimum fine of $10.00. Subsequently the Circuit Court judge declared the zoning ordinance unconstitutional and dismissed that charge.

After months of defending multiple allegations of unlawful conduct, all of the charges against Grimes were resolved in his favor. While the employment actions and prosecutions were being taken, seventeen newspaper articles and four newspaper editorials were published in the local newspaper discussing the allegations that Grimes had violated the ordinances he was charged with enforcing. Eight of the articles contained quotes from Schanze, Johnson, Robillard and Studley; the quotes were not mere statements of "no comment." Before Grimes had even presented his case to the Personnel Board, Johnson was correctly quoted in a newspaper article proclaiming that "[h]e's [Grimes] no longer employed. He's not coming back." All of this publicity necessarily created a stigma and damaged Grimes' reputation.

During the pendency of the Municipal Court and Circuit Court prosecutions against Grimes, he was on bond under legal compulsion to appear, and did appear, before the

municipal and circuit courts on multiple occasions.

The Personnel Code provided for arbitration following the decision of the City Manager. However, as detailed later in this Petition, this procedure did not provide a meaningful opportunity for review and did not cure the due process deprivations which had already occurred.

In May 1999 Grimes filed a civil action in the District Court seeking recovery under 42 U.S.C. §1983 (hereafter "§1983") for deprivation of his constitutional right to due process with respect to the discipline of him and the suspension and termination of his employment; to be free from unreasonable seizure through malicious prosecution; to be free from unreasonable search and invasion of privacy; and, to confront witnesses. The respondents filed a motion for summary judgment which the District Court sustained. Grimes appealed the judgment of the District Court for the following reasons: the court made eleven errors in the factual findings set out in its order; the court failed to view the evidence in the light most favorable to Grimes and to give him the benefit of all reasonable inferences to be drawn from the evidence; if the court had based its order on correct findings of fact the record would have reflected a genuine issue of material fact precluding summary judgment; and the court erred in its legal determination on seven issues. The Court of Appeals summarily affirmed the decision of the District Court. See, Pet. App. A-23.

Grimes challenged the holding of the District Court with respect to his **due process** claim because the Court failed to consider, in the light most favorable to Grimes, evidence presented showing the lack of a meaningful opportunity to be heard. As discussed later in this Petition, as City Manager, Schanze had the final decision making authority and power of review over the actions against Grimes while at the same time Schanze was involved in

making the initial decisions about what employment and criminal actions should be taken.

On Grimes' **malicious prosecution** claim, the courts below held that the malicious prosecution claim failed because there was no evidence the City acted in an outrageous manner in bringing criminal charges and that the charges were brought in good faith. Grimes' challenged this finding of the District Court because the Court ignored the evidence in support of the theory under which Grimes was clearly proceeding to prove his claim of malicious prosecution (proof of the state law elements of malicious prosecution together with the deprivation of a constitutional right), and instead found a failure of proof on a theory of recovery under which he was not proceeding, relying on a case which was no longer controlling legal authority.

Grimes disputed the finding that he "lacked standing" to challenge the **search** of the properties because he did not own them because the evidence showed that Grimes did own the properties when they were searched in January and February 1998 and because his status as a person in possession or control of property, real and personal, in April 1998 was a possessory interest sufficient as a matter of law to afford him constitutional protection to challenge the illegal searches. Under the City's ordinances, Grimes had to be an owner or a person in possession or control of property within the City's limits in order for there to exist probable cause of the commission of a crime sufficient to support the issuance of a search warrant. Indeed Grimes was prosecuted as a person in possession or control of property rather than as an owner, as the respondents did not take serious issue with Grimes' lack of record ownership resulting from a transfer of title until they defended the District Court action.

The courts below found that Grimes' claim for deprivation of his **right to confront witnesses** failed because

Grimes' failed to present any evidence that the City retaliated against him for taking his criminal case to trial. The Court failed to consider circumstantial evidence detailed later in this Petition, in the light most favorable to Grimes and failed to view all reasonable inferences from that evidence in favor of Grimes.

This petition for a writ of certiorari followed the denial of rehearing en banc by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

This Petition should be granted for three reasons. *First*, the decision below conflicts with decisions of this Court and of other circuits concerning the constitutional foundation for a claim of malicious prosecution brought under §1983 and what the elements are for such a claim.

Second, the decision below decides the following important questions of federal law, which have not been, but should be settled by this Court: (1) whether the Fourth Amendment provides the constitutional foundation for a claim of malicious prosecution under §1983 and if so, what the elements of the claim are and what constitutes a seizure with respect to such a claim; (2) what constitutes a meaningful opportunity to be heard when the City Manager who serves in the capacity of having final review or decision making authority over termination of a public employee, is involved in making initial termination, disciplinary, prosecution and search decisions and is required by law to advise the City Council on approval of an arbitration decision which would follow the City Manager's decision; (3) when an illegal search is conducted to support criminal charges which can arise only because of the condition resulting from the existence of personal property on real property, can the search be challenged by the person who owns or controls the

personal property located on the real property which the person also owns, controls or possesses; (4) and, should a court consider evidence of a very close temporal proximity between the exercise of a constitutionally protected right in relation to the taking of an adverse employment action, and is such evidence sufficient evidence of causation to preclude summary judgment?

Third, summary judgment was not appropriate on any of Grimes' claims. As to the due process, search and confrontation claims there were genuine issues of material fact which precluded summary judgment. The respondents were not entitled to judgment as a matter of law on the malicious prosecution claim because the Court applied the wrong legal standard for determining that claim. Since a discussion of this reason for granting the writ is interrelated to the other reasons for granting the writ, the discussion is included within sections I, II, III and IV of this section of the Petition rather than in a separate sub-section.

I. The Decision Below Conflicts With Decisions Of This Court And Of Other Circuits Concerning Claims Of Malicious Prosecution Brought Under 42 U.S.C. §1983 And It Decides An Important Question Of Federal Law Which Has Not Been, But Should Be Settled By This Court. Application Of An Incorrect Legal Standard By The Court Below Precluded Summary Judgment.

The decision of the Court of Appeals on Grimes' malicious prosecution claim conflicts with the holdings of this Court and of a majority of other circuits addressing the issue, which recognize that a cause of action for malicious prosecution may exist under 42 U.S.C. §1983 when a Fourth Amendment seizure is involved. As discussed herein, the diversity of judicial opinion on this question, as well as on the

question of what constitutes a seizure, compels this Court to settle these questions.

Grimes specifically prosecuted his claim for malicious prosecution under §1983 alleging that events related to the initiation and maintenance of prosecutions against him, which were unsupported by probable cause, constituted a seizure within the meaning of the Fourth Amendment. Seizure of an individual without probable cause is an unreasonable seizure. See, Graham v. Connor, 490 U.S. 386, 396-397 (1989). Grimes pleaded the Missouri state law elements for malicious prosecution in addition to facts demonstrating a seizure. Grimes presented evidence that he was seized within the meaning of the Fourth Amendment in that he was personally served with a summons and citation to appear in court in three cases on charges of committing five ordinance violations; the facts pleaded to support the charges in light of the language of the ordinances, demonstrated there was no probable cause to support the charges (as discussed previously in this Petition in the "Statement of the Case") which carried penalties of fines and/or incarceration; he was placed on bond throughout the municipal and circuit court proceedings to assure his appearance on multiple occasions before the courts; and, he made multiple appearances before the courts to answer to the charges against him.

The Court of Appeals, agreeing with the District Court finding, held that Grimes' claim failed because

> . . . there was no evidence the City acted in an *outrageous manner* in bringing criminal charges against Grimes. Although Grimes's [sic] was eventually acquitted because the ordinances he violated were unconstitutionally vague, the charges were brought in *good faith*. (Pet. App. A-2).

This finding and the decision based upon it, in light of Grimes' clear claim of a seizure, establish a rule of law in the Eighth Circuit that a plaintiff can prevail on a claim of malicious prosecution under §1983 only if a state actor behaves in an "outrageous manner" and brings charges without "good faith." This rule conflicts with the holdings of this Court and of a majority of other circuits which have addressed this issue.

The decision in Albright v. Oliver, 501 U.S. 266 (1994) is this Court's most recent pronouncement providing any guidance for evaluating the substance of a claim for malicious prosecution raised under §1983. The rule of Albright is that such a federal cause of action does not arise from constitutional guarantees of due process but may arise from the Fourth Amendment protection against unreasonable seizure. Albright appears to acknowledge that in cases of egregious behavior that do not involve a seizure, a plaintiff may have a §1983 claim supported by substantive due process rights. Grimes' claim was based upon a seizure within the meaning of the Fourth Amendment and was not based upon egregious behavior occurring without a seizure.

Since the decision in Albright, the First, Second, Third, Fourth, Fifth, Seventh, Tenth and Eleventh Circuits have analyzed and recognized claims of malicious prosecution under §1983 considering Fourth Amendment principles together with, or by analogy to, state or common law elements of malicious prosecution. These courts have concluded, consistent with the suggestion of Albright, that a seizure within the meaning of the Fourth Amendment must be involved in order for a claim to be stated. See, Nieves v. McSweeney, 241 F.3d 46, 53 (1st Cir. 2001); Rohman v. New York City Transit Authority, 215 F.3d 208, 215 (2nd Cir. 2000); Gallo v. City of Philadelphia, 161 F.3d 217, 222 (3rd Cir. 1998); Lambert v. Williams, 223 F.3d 257, 260-262

(4th Cir. 2000), citing Brooks v. City of Winston-Salem, 85 F.3d 178, 183-34 (4th Cir. 1996); Price v. Roark, ___ F.3d ___, No. 00-60589 (5th Cir. July 18, 2001), citing Kerr v. Lyford, 171 F.3d 330, 339-40 (5th Cir. 1999); Cervantes v Jones, 188 F.3d 805, 809 (7th Cir. 1999), citing Reed v. City of Chicago, 77 F.3d 1049, 1051 (7th Cir. 1996); Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996); and, Uboh v. Reno, 141 F.3d 1000, 1002-1004 (11th Cir. 1998).

A panel of judges of the Sixth Circuit has reluctantly affirmed that the rule of controlling authority in that circuit is that there is no separate §1983 claim for malicious prosecution in cases based on alleged Fourth Amendment violations. Darrah v. City of Oak Park, ___ F.3d ___, No. 00-1253 (6th Cir. June 22, 2001), citing Frantz v. Village of Bradford, ___ F.3d ___, No. 99-4186, 2001 WL 387731 (6th Cir. Apr. 18, 2001) (there can be no reliance on state law to define a §1983 claim for malicious prosecution based on alleged Fourth Amendment violations but such a cause may still be available under the Fourteenth Amendment).

The Ninth Circuit has yet to rule on the question of the constitutional foundation for a claim of malicious prosecution under §1983. Haupt v. Dillard, 17 F.3d 285, 290 (9th Cir. 1994).

In Grimes' case, the District Court cited Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990) in support of its finding. (Pet. App. A-18). The decision in Gunderson, which preceded the decision in Albright, addressed a claim for malicious prosecution under §1983 as a possible claim for deprivation of procedural or substantive due process; the decision did not address the question as a matter of a seizure under the Fourth Amendment. In light of the decision in Albright, the Gunderson decision was no longer good law when applied to Grimes' case and should not have been relied upon by the District Court. The court's application of an

incorrect legal standard precluded summary judgment in Grimes' case.

After the decision in Albright and prior to the decision in Grimes' case, the Eighth Circuit had held that an action for malicious prosecution by itself is not punishable under §1983 because is does not allege a constitutional injury. Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000). Recently, in deciding a question of qualified immunity in a §1983 claim for malicious prosecution for conduct occurring prior to the decision in Albright, the Eighth Circuit found that dictum in Justice Ginsburg's concurring opinion in Albright, which addressed pre-trial deprivations of liberty (bond, attendance at court hearings, limitations on travel), did not amount to a statement of clearly established law and therefore the state actor in the case was entitled to qualified immunity. Technical Ordnance, Inc. v. U.S., ___ F.3d ___, No. 99-4334 (8th Cir. March 26, 2001). In the opinion in Technical Ordnance the Eighth Circuit also commented that it had never held that a Fourth Amendment seizure would exist as a result of posting bond, being summoned to appear before court, and being made to answer charges although prosecuted without probable cause.

In light of the decision in Grimes' case, even taking into account the post-Albright decisions of the Eighth Circuit upon which the District Court did not rely, the Eighth Circuit rule now is that malicious prosecution is actionable under §1983 if there is a constitutional injury which arises from conduct which is outrageous and undertaken without good faith.

As demonstrated above, there is a diversity of judicial opinion concerning the constitutional protections implicated by claims of malicious prosecution under §1983, the elements of such claims, and the extent to which state law is a part of a §1983 cause.

There is also a diversity of judicial opinion as to what constitutes a seizure within the meaning of the Fourth Amendment. See, Britton v. Maloney, 196 F.3d 24, 28-29 (1st Cir. 1999) (receipt of a summons by mail alone does not constitute a seizure); Murphy v. Lynn, 118 F.3d 938 (2nd Cir. 1997) (restriction on leaving state and multiple mandatory court appearances constitute a seizure); Gallo v. City of Philadelphia, 161 F.3d 217, 222 (3rd Cir. 1998) (requiring the posting of a $10,000 bond, attendance at court hearings, regular contact with pre-trial services, and travel limitations constitutes a seizure); Brooks v. City of Winston-Salem, 85 F.3d 178, 183-34 (4th Cir. 1996) (arrest not supported by probable cause with prosecution which terminates in favor of the plaintiff constitutes a seizure); and, Evans v. Ball, 168 F.3d 856, 861 (5th Cir. 1999) (summons to appear in court coupled with requirements to obtain permission before leaving the state, report regularly to pretrial services, sign a personal recognizance bond, and provide personal information constitutes a seizure).

The divergent opinions on these issues related to claims for malicious prosecution brought under §1983 preclude equal treatment of citizens by state actors with respect to criminal prosecutions. For this reason this Court should settle these questions.

II. The Decision Below Has Decided A Question Of What Constitutes A Meaningful Opportunity To Be Heard With Respect To Termination Of Public Sector Employment, Which Has Not Been, But Should Be, Settled By This Court. The Existence Of A Genuine Issue Of Material Fact On This Claim Precluded Summary Judgment.

As to Grimes' allegation of deprivation of due process in the discipline, suspension and termination of him in his employment, the Court of Appeals found that Grimes

> had an opportunity to be heard both before and after his termination. (Pet. App. A-2).

The evidence before the courts below showed that Schanze as City Manager was the person with the power of final review over the decision to terminate Grimes' employment and that Schanze was involved in making the termination decision and other disciplinary decisions, as well as being concurrently involved in making decisions to initiate and maintain criminal prosecutions and to execute a search against Grimes. Further, the procedure for arbitration following Schanze's review required approval of the arbitration decision by the council of the City and Schanze was obligated under City ordinances to advise the council as it made such decisions. In light of the case presented, the decisions below have decided the following important question of federal law which has not been, but should be settled by this Court: is due process violated when the City Manager who serves in the capacity of having final review or decision making authority over termination of a public employee, is involved in making the initial termination and other disciplinary decisions, is involved in making decisions to initiate and maintain criminal prosecutions and a search, and is required by law to advise the City Council on approval of an arbitration decision which could follow the City Manager's decision?

The undisputed evidence was that under the ordinances of the City, the decision of the Personnel Board reviewing the decision to terminate Grimes' employment was advisory only to Schanze. Upon board consideration, two

members of the board voted to return Grimes to his employment and two members voted to uphold the termination. Schanze decided to uphold the termination.

Before reviewing the board's decision, Schanze had been involved in making and directing the decisions to suspend and terminate Grimes' employment and he had been involved in discussions related to the use of a search warrant procedure against Grimes and the prosecution of him. These facts raise a genuine issue of material fact as to whether Schanze was an impartial or unbiased decision maker in his role of considering the matter following the Personnel Board proceedings and whether, as a result, Grimes received a *meaningful* opportunity to be heard by an *unbiased decision maker* as required to satisfy due process standards. One circuit court has held that a person involved in a termination decision is not un unbiased decision maker and due process would be violated by that person's service as a hearing officer. Langley v. Adams County, Colo., 987 F.2d 1473 (10th Cir. 1993).

The undisputed evidence also was that Schanze had never heard Grimes' position in response to the charges against him. Schanze did not attend the Personnel Board proceeding and because the proceedings were not recorded, Schanze had no transcript for his review. He relied solely on what Johnson, Robillard and Studley told him.

The influence of Schanze's involvement in the actions against Grimes prior to review following the Personnel Board decision, is most readily apparent in two undisputed facts. First is the fact that before Grimes had even presented his case to the Personnel Board, Johnson was correctly quoted in a newspaper article proclaiming that "[h]e's [Grimes] no longer employed. He's not coming back." Second is the fact that after the Personnel Board review, Johnson, as secretary of the board, presented a proposed decision for Schanze

upholding the termination. It is undisputed that in doing so, Johnson departed from his standard procedure in that he normally would have presented one letter upholding the termination and one letter overturning the termination. Certainly the only reasonable inference from these facts is that as a result of Schanze's involvement prior to the Personnel Board proceeding, Johnson knew what Schanze's final decision was going to be. This evidence demonstrates that Schanze was not an unbiased decision maker. To finally decide that Grimes should be reinstated to his employment would have required Schanze to admit that the decisions he made with Johnson, Robillard and Studley were wrong.

The process for consideration of the termination decision after the Personnel Board proceeding and Schanze's decision did not cure the due process deprivations which had occurred. The Personnel Code authorized for arbitration following the decision of the City Manager. However, for the following reasons, any one of which precluded a meaningful opportunity to be heard, Grimes declined to arbitrate the matter: the Personnel Code made the arbitration decision binding on an employee while the decision was, at least in part, subject to approval by the City Council for the City; as City Manager, Schanze was obligated by ordinance to advise the City Council on what action it should take and it was not reasonable to expect that Schanze would ever advise the council to reinstate Grimes because that would require Schanze to admit that he and other managers of the City had made incorrect disciplinary decisions (Schanze had already been unwilling to take such a position as demonstrated by his response to the Personnel Board decision); one member of the City Council had expressed his opinion that Grimes' had gotten what he deserved; one member of the City Council had information about the situation from his son who was a code enforcement inspector with Grimes; and, as a non-union

employee and though unemployed, Grimes was required to assist in paying the expenses of the arbitration.

Grimes did not stand a chance of having a meaningful opportunity for review of the termination of his employment, or for any other disciplinary action against him for that matter. It is clear that there existed a genuine issue of material fact as to whether Schanze was an unbiased decision maker. If Schanze thought Grimes guilty enough to be prosecuted how could he take a position that Grimes remained worthy of being employed? Schanze could have abstained from involvement in making the preliminary decisions about the search, prosecution, discipline, suspension and termination. He did not abstain and as a result Grimes' right to due process was trampled over. The court was in error to grant summary judgment.

III. The Decision Below Concerning "Standing" To Challenge A Search Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be Settled By This Court. The Existence Of A Genuine Issue Of Material Fact On This Claim Precluded Summary Judgment.

In January and February 1998, Studley and Hughes entered on property then owned by Grimes without his permission, without a search warrant and without any citizen complaint concerning the condition of the property. On April 1, 1998, when executing a search warrant issued for the property at 1903-05 Elwood, Robillard, Studley and Hughes entered on property then possessed or controlled by Grimes at 1902-06 Elwood without his permission, without a search warrant and without any citizen complaint concerning the condition of the property. In ruling on Grimes' claim for damages based upon these unlawful searches, the Court of

Appeals agreed with the District Court, and stated that

> Grimes lacked standing to bring any Fourth Amendment claim because he no longer owned the property in question when it was searched without a warrant. (Pet. App. A-2).

The undisputed evidence before the courts was that in January and February 1998 Grimes was the owner of the personal and real property located at 1906 Bellevue, 1902-06 Elwood and 1903-05. In January 1998 Studley observed and ignored the "no trespassing" posting on the property which is demonstrative of Grimes' intention to maintain privacy. At the time of the April 1998 search of 1902-06 Elwood, Grimes was the person in control or possession of 1902-06 Elwood and he was the owner of the personal property located at that address.

Under Section 15-27(a) of the City's ordinances, Grimes had to be an *owner* of property or a person in *control* or *possession* of property to be subject to the City's nuisance code. To be subject to the zoning code, Section 31-073(d) required that Grimes be "[t]he *owner* or general *agent* . . . of a premises where a violation . . . shall exist . . . ." In their answers to Grimes' Complaint in the District Court, the respondents admitted that Grimes was the owner or person in control of 1902-06 Elwood. The basis of the allegations which the respondents leveled at Grimes to justify their actions against him, was the condition resulting from the existence of Grimes' personal property on real estate located within the City's limits.

In light of the preceding discussion, it can be seen that the import of the decision below is this: a person who owns or controls personal property located on real property which the person also controls or possesses, does not have a

reasonable expectation of privacy sufficient to challenge an illegal search of the property. It is likely that jurisdictions other than the City of St. Joseph, Missouri seek to regulate such situations under the threat of criminal prosecution. The protection from deprivation of the Fourth Amendment right to be free from unreasonable search is of such significance that this question should be addressed by this Court.

For purposes of searching the property for prosecuting Grimes and for disciplining him and terminating his employment, the respondents considered him to have an ownership or possessory interest in the personal property and the area searched by them even if he was not the record owner of the property. Admissions made by the respondents in their answers to Grimes' District Court Complaint were evidence properly before the District Court and the Court of Appeals, as were writings from Robillard to Grimes indicating that the respondents considered Grimes responsible even if he was not the owner of the real property. The District Court's own factual findings referred to the concerned property as "land that he [Grimes] controlled" and as "the Plaintiff's [Grimes'] property (Pet. App. A-11, first full paragraph, and Pet. App. A-13, first full paragraph) Yet, the courts have determined that Grimes should not be able to challenge the search which provided the evidence supporting the charges for which he was prosecuted as well as disciplinary action.

Fourth Amendment protection is not afforded only to record owners of a place searched; ownership of a place searched is a factor to be considered in the totality of the circumstances of a search but is not determinative. Protection from illegal search is currently analyzed by reference to an expectation of privacy and the reasonableness of that expectation. Rakas v. Illinois, 439 U.S. 128, 143-144 (1978). In Grimes' case the possession and control he had

over the real and personal property involved raised a genuine issue of material fact regarding the expectation of privacy and summary judgment on his claim was inappropriate. Also, analysis of a Fourth Amendment claim as an issue of standing was expressly rejected in Rakas and the courts below were in error to reject Grimes' claim on that ground. *Id.*, at 139-140.

In the proceedings below the respondents claimed they did not know of the existence of a property at 1902-06 Elwood when they searched 1903-05 Elwood pursuant to a search warrant. That simply was not the truth. Prior to the April 1998 search, Studley and Hughes had made written notations about 1902-06 Elwood. On the day of the execution of the search warrant, Robillard made a notation of "1902-06 Elwood" on a Polaroid photograph which he took of that property.

After illegally searching the property, the respondents considered what they saw to make their decisions to prosecute Grimes and to discipline him and terminate his employment. The respondents were even prepared to re-use the search warrant procedure to gain information to make decisions about Grimes' employment status as shown by Johnson's note dated April 13, 1998. (Pet. App. A-29). The note does not show that any consideration was given to the requirement for the existence of probable cause to support the application for another search warrant.

The possession and control which Grimes had over the real and personal property involved was required for the City to be able to take action against him for alleged violations of City ordinances and was sufficient to constitute a reasonable expectation of privacy. The findings from the search were relied upon by the respondents to prosecute Grimes, to discipline him, and to terminate his employment. If the court below had fully considered the evidence before it and had drawn all reasonable inferences from that evidence in

favor of Grimes, the court could not have granted summary judgment in favor of the respondents.

IV. The Decision Below Concerning Proof Sufficient To Establish Retaliation For Exercising Constitutional Rights Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court. The Existence Of A Genuine Issue Of Material Fact On This Claim Precluded Summary Judgment.

The Court of Appeals affirmed the District Court holding that

> Grimes failed to present any evidence that the City retaliated against him for taking his criminal case to trial. (Pet. App. A-2).

In considering this claim the Courts totally ignored the inference of causation which arose from the temporal proximity between Grimes exercise of his right to confront witnesses and the suspension of his employment. This Court should decide if a court should consider evidence of very close temporal proximity between the exercise of a constitutionally protected right in relation to the taking of an adverse employment action and if such evidence is sufficient evidence of causation to preclude summary judgment.

On Thursday, April 30, 1998 Grimes rejected a plea offer by the City and requested that the multiple cases against him be set for trial. Robillard, Studley and Hughes were present at the arraignment hearing when Grimes requested a trial and at that time they were aware that he had the right to a trial to confront witnesses. On the following Monday, May 4, 1998, Robillard gave Grimes a letter indicating that he was being suspended from his job without pay.

Throughout the proceedings below Schanze, Johnson, Robillard and Studley banded together to adamantly deny any causal connection between the filing of charges of municipal ordinance violations and decisions with regard to Grimes' employment. In discovery, Robillard and Studley went so far as to deny that they were ever present during a conversation involving Schanze where the topics included Grimes' employment status, the actual or possible use of a search warrant and the possibility of municipal court charges. Johnson's note memorializing a meeting on April 13, 1998 proved the testimony of Robillard and Studley to be untruthful. (Pet. App. A-29). The note demonstrated that all of those issues were concurrently discussed by Schanze, Johnson, Robillard and Studley; they discussed postponing a decision on "whether to return John to his Code Enforcement Duties" "pending the outcome" of the cases in municipal court, noting that "John's court date is April 30". When the "outcome" of the court appearance on April 30, 1998 was the scheduling of trial so Grimes could confront the witnesses against him, Grimes was nearly immediately suspended. The scheme shown by this note, carried out by the meeting participants, is evidence of retaliation against Grimes' for exercising his right to confront witnesses.

In addition to the formulation of a plan for action tied to Grimes' arraignment, the very close temporal proximity between Grimes' exercise of his right to confront witnesses and the suspension of his employment, was evidence sufficient, by itself, to create an inference of causation precluding summary judgment. If Grimes' April 30, 1998 request to have a trial to confront witnesses was not the motivating factor for his suspension, why hadn't he been suspended *before* his arraignment? The only event occurring in the three business days between the April 30 arraignment and the May 4 suspension was Grimes' arraignment and

request for trial.

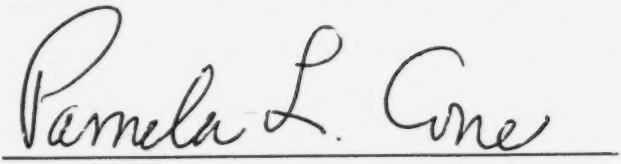
This Court has acknowledged there are cases which hold that a very close temporal proximity between an employer's knowledge of protected activity and an adverse employment action is sufficient evidence by itself, to establish causation and thus a prima facie case of employment discrimination. Clark County School District v. Breeden, 532 U.S. ___, No. 00-866 (U.S. April 23, 2001). The Eighth Circuit had taken that very position in a public employment case (see, Hudson v. Norris, 227 F.3d. 1047, 1051-1052 (8th Cir. 2000)) yet the courts below completely ignored the evidence of the very close proximity of events in Grimes' case.

The conduct of the respondents exacted a price from Grimes for confronting his accusers. The price was his job and he was left to mount his defense as an unemployed person. The formulation of a plan to take recourse with respect to Grimes' employment tied to the occurrence of his arraignment, together with the very close temporal proximity of the exercise of his right to confront in relation to the suspension of his employment, without any other intervening event or information, was sufficient evidence to preclude summary judgment.

CONCLUSION

For the foregoing reasons, this Petition For Writ of Certiorari should be granted.

Respectfully submitted,



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